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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 JOSEPH P. CUVIELLO and DENIZ
13 BOLBOL, individually,

14 Plaintiffs,

15 v.

16 ROWELL RANCH RODEO, INC.;
17 HAYWARD AREA RECREATION AND
PARK DISTRICT; HAYWARD AREA
18 RECREATION AND PARK DISTRICT
PUBLIC SAFETY MANAGER/RANGER
19 KEVIN HART; ALAMEDA COUNTY
SHERIFF'S OFFICE; ALAMEDA COUNTY
20 DEPUTY SHERIFF JOSHUA MAYFIELD;
and DOES 1 and 2, in their individual and
21 official capacities, jointly and severally,

22 Defendants.
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Case No. 3:23-cv-01652-VC

**NOTICE OF CROSS-MOTION AND
CROSS-MOTION OF DEFENDANTS
COUNTY OF ALAMEDA AND
DEPUTY SHERIFF JOSHUA
MAYFIELD FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT;
CONSOLIDATED MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND IN SUPPORT OF
DEFENDANTS' CROSS-MOTION**

Judge: Hon. Vince Chhabria
Date: August 15, 2024
Time: 10:00 a.m.
Courtroom: 4 – 17th Floor

Action Filed: April 6, 2023
Trial Date: October 21, 2024

NOTICE OF CROSS-MOTION AND CROSS-MOTION

PLEASE TAKE NOTICE that on August 15, 2024, at 10:00 a.m., or as soon thereafter as this matter may be heard in Courtroom 4, 17th Floor, of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, defendants County of Alameda (“County”) and Alameda County Deputy Sheriff Joshua Mayfield (“Dep. Mayfield”) (collectively “Defendants” or “County Defendants”) will and hereby do move this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for an order granting summary judgment or in the alternative partial summary judgment in favor of these Defendants on the third, fifth and sixth claims for relief in the Second Verified Amended Complaint For Injunctive And Declaratory Relief And Damages (ECF No. 54) (“Complaint”) filed by Plaintiffs Joseph P. CuvIELLO and Deniz Bobol in the above-captioned action.

This motion is made on the grounds that there is no genuine issue as to any material fact and that the County Defendants are entitled to judgment as a matter of law, because there is no evidence that the County Defendants violated Plaintiffs’ free speech rights, including their rights under Article I, section 2 of the California Constitution and under the First Amendment of the United States Constitution, in violation of Civil Code section 52.1 and 42 U.S.C. § 1983.

In the alternative, Defendants move for partial summary judgment on the following issues:

(1) there is no evidence that Plaintiffs suffered actual compensatory damages, so they are limited to a recovery of the \$4,000 statutory minimum damages if a violation of the Bane Act (Cal. Civ. Code §52.1) is found;

(2) Neither Plaintiff may recover a civil penalty of \$25,000 if a violation of the Bane Act (Cal. Civ. Code §52.1) is found;

(3) Plaintiffs may not recover treble damages against these Defendants;

(4) Neither the County nor Dep. Mayfield are liable for punitive damages sought by Plaintiffs; and

(5) Plaintiff Joseph P. CuvIELLO is not entitled to recover attorney’s fees against these Defendants;

(6) Plaintiffs are not entitled to injunctive relief.

1 This motion is based upon this notice of cross-motion and cross-motion, the
2 accompanying memorandum of points and authorities, the declarations of Marc Brainich,
3 Deputies Joshua Mayfield, Christian Campbell, and Mateusz Laszuk, and any reply papers, and
4 upon all pleadings, records and papers on file herein, as well as on such other oral and
5 documentary evidence and argument as may be presented at the hearing of this motion.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

While Plaintiffs Joseph Cuiello (“Cuiello”) and Deniz Bolbol (“Bobol”) assert repeatedly that their free speech rights had been unlawfully interfered with by the County of Alameda’s Deputy Sheriff Joshua Mayfield (“Mayfield”), the video evidence shows otherwise. Those videos show that from the very beginning Plaintiffs were—to put it in the vernacular—itching for an altercation with the County’s deputies. For example, although Mayfield and his fellow deputy sheriffs had been sent to the rodeo at Rowell Ranch to provide a general law enforcement presence at an event attracting members of the public, Plaintiff Cuiello “knew” from the moment Mayfield arrived—and before a single word had been exchanged between Mayfield and Plaintiffs—that Mayfield “was an asshole from the get-go.” As Cuiello put it, Cuiello “knew...because I’ve met cops like you so many times and filed lawsuits against cops like you.” Similarly, when the deputies were first walking toward Plaintiffs, Bolbol said, “We got a lawsuit. Here we go.”

Although Plaintiffs made several attempts to goad Deputy Mayfield into saying or doing something Plaintiffs viewed as unconstitutional and actionable, Mayfield did not take the bait and instead remained calm and professional while carrying out the goal of making the event a safe one for every person. He never ordered Plaintiffs to move to the free speech area that had been set up; he never arrested Plaintiffs; and he never threatened Plaintiffs with arrest. At no time during or following their interactions with Mayfield and the other deputies, did Plaintiffs ever alter or cease their free speech activities (attempting to speak with rodeo patrons, holding up signs for viewing by the patrons, and attempting to hand leaflets to the patrons as they approached the rodeo entrance). Nor did Plaintiffs ever express any fear of arrest or any feelings of being intimidated to their fellow demonstrators on the single day that Deputy Mayfield was at Rowell Ranch. On the contrary, Cuiello boasted to the other demonstrators that if the deputies arrested him, he would sue and “be entitled to damages.” Similarly, Bolbol said the County would have to pay “[h]undreds of thousands of dollars” if they arrested Plaintiffs.

In sum, while Plaintiffs attempt to put their own spin on what occurred in an effort to impose liability on the County and Deputy Mayfield, the videos—both the deputy sheriffs’ body - worn camera footage and Plaintiffs’ own videos—tell the true story of what happened, and prove that there was no infringement on or interference with Plaintiffs’ free speech rights by the County Defendants. The Court should reject Plaintiffs’ claims, deny their motion, and grant summary judgment for the County Defendants.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Summary Of Facts

Plaintiffs’ claims against Defendants County of Alameda (“County”) and Deputy Joshua Mayfield (“Mayfield”) (collectively, the “County Defendants”) are based solely on events that took place on one day of the three days they demonstrated at the Rowell Ranch Rodeo—May 20, 2022, and specifically, Mayfield’s three interactions with them. Rowell Ranch is owned by the Hayward Area Recreation And Park District (“HARD”). Rowell Ranch Rodeo, Inc. (“RRR”) uses the property for their rodeo every year.

1. Mayfield’s First Interaction With Plaintiffs

Mayfield and the other deputies arrived at the rodeo at 5:57 p.m. to provide a law enforcement presence. Declaration of Joshua Mayfield (“Mayfield Decl.”), ¶2. However, before they even approached Plaintiffs or had a single conversation with them, Bolbol states to CuvIELLO: “They [Rowell Ranch Rodeo employees] think the sheriffs are going to come over here and arrest us.” Declaration of Marc Brainich (“Brainich Decl.”), Ex. C at 8:20 minute mark of video (“MM”). Then, as the deputies, including Mayfield, began their approach to Plaintiffs, Bolbol states, “We’ve got a lawsuit. Here we go.” *Id.* at 9:35 MM.

But when the deputies arrived at the location where Plaintiffs had set up their protest, one of the deputies, Deputy Campbell, immediately states, “I want say hello. We are going to be hanging out here, its free speech, we get that...all we want is for you to play nice – all we ask.” Declaration of Christian Campbell (“Campbell Decl.”), Ex. A; Brainich Decl., Ex. C, 9:50-11:03 MM. Deputy Campbell then goes on, “They actually want you guys to be over there,” as he points to the front entrance. Bolbol responds, “We know. We’re not doing that.” *Id.* Campbell

1 responds, “Okay; we are just letting you know.” Mayfield then adds, “There is a designated area;
 2 if you guys go over there great, but if you choose to stay here, just keep it peaceful.” Bolbol
 3 responds, “Absolutely.” Mayfield then says, “Don’t yell at the patrons...it’s their choice to attend
 4 the event, just like it is your choice not to like it... we’re all going to be peaceful...and no
 5 problem.” The deputies then left with Campbell saying, “have a safe night” and Mayfield saying,
 6 “you guys have a great evening.” Bolbol responds by thanking them. *Id.* This entire interaction
 7 lasted just over two minutes.

8 Two minutes after that initial encounter with Plaintiffs, at 6:01 p.m.¹ Mayfield received a
 9 call from Amy Bowles at Alameda County Sheriff’s Office (“ACSO”) Dispatch. Brainich Decl.,
 10 Ex. K at 10:45-11:25 MM. He informs her that the demonstrators had been told “to keep it
 11 peaceful and they’ve been advised that there is a designated area for them.” He also advises that
 12 the deputies will “be doing security here” in case the demonstrators “act up.” At no point does he
 13 advise Ms. Bowles that the protestors had done anything wrong or violated any laws; the clear
 14 implication of his words are that he did not intend to compel them to move to the FSA. *Id.*

15 2. Mayfield’s Next Interaction With Plaintiffs

16 The next interaction between plaintiffs and any of the deputies was at 6:08 pm, when
 17 HARD Safety Manager Kevin Hart (“Hart”) approaches plaintiffs with Deputy Mayfield
 18 accompanying him. After introducing himself, Hart shows plaintiffs a map of the Rowell Ranch
 19 parking lot, informing them that they were not in the designated free speech area (“FSA”). He
 20 then says, “I’m asking you to go to the designated area...failure to do so will not be good.”
 21 Declaration of Joshua Mayfield (“Mayfield Decl.”), Ex. A-1; Brainich Decl., Ex. F. Bolbol
 22 responds, “I’m not blocking any ingress/egress.” Cuvillo then turns his attention to Mayfield
 23 (who was standing next to Hart) and asks him whether he was going to arrest them if they didn’t
 24 comply. Mayfield responds that they “could be arrested for trespassing.” *Id.* Cuvillo responds,
 25 “I don’t want a could be arrested...I want to know ahead of time. You need to call your watch
 26

27 ¹ The timestamp (and date) on the body-worn camera (“BWC”) videos of officers of the Alameda
 28 County Sheriff’s Office are time-stamped pursuant to Coordinated Time (UTC), the successor to
 Greenwich Mean Time. UTC is seven hours ahead of California time during Pacific Daylight
 Time. Brainich Decl., ¶10.

1 commander.” Mayfield asks, “Sir, Sir, would you let me explain?” Cuiello cuts him off and
 2 says, “I’m telling you about my rights...this is a public park, quintessential free speech right...no
 3 significant interest in putting us over there...I want to know if you are going to arrest us, because
 4 I do not want to be arrested, so if you are going to arrest me illegally, I want to know, because I
 5 don’t want to be arrested and there is none of this maybe, could be. I want you to tell me before
 6 that I’m going to arrest you if you don’t leave. If you don’t tell me that, there is a big problem.”
 7 Mayfield responds, “I’m not required to tell you whether I will arrest you.” Cuiello retorts, “Yes
 8 you are. If I’m asking you, you have to.” While Hart begins talking to Plaintiffs again, Mayfield
 9 adds, “It is a private event” to which Cuiello responds, “It is doesn’t matter, its open to the
 10 public.” Hart then asks all of the protesters individually whether they are refusing to leave.
 11 Cuiello specifically responds, “I’m not leaving and if they arrest us, they will be sued for
 12 damages.” *Id.*

13 While Hart is going down the line asking the protestors whether they are refusing to leave,
 14 Mayfield leaves and makes a phone call within the line of sight of Plaintiffs, starting at 6:11 pm.
 15 Brainich Decl., Ex. F. Plaintiffs remain where they are, continuing to hand out pamphlets and
 16 speak with patrons. Declaration of Mateusz Laszuk (“Laszuk Decl.”), Ex. A. While Mayfield is
 17 on his phone, Bolbol says to Cuiello, “He [Mayfield] is calling his boss to see if he can get
 18 permission to arrest us.” Cuiello states, “It is just amazing that the Police are willing to violate
 19 peoples’ rights to protect private interest.” Bolbol responds, “They want to, but hopefully the
 20 watch commander has a more level head.” *Id.*

21 At 6:16 pm, Mayfield ends his call and then walks over and speaks with Hart and an RRR
 22 employee standing out of earshot of Plaintiffs. Brainich Decl., Ex. F, at 7:24-10:40 minute mark
 23 (“MM”) of video. While Mayfield is speaking with them, Bolbol says to Cuiello, “He’s
 24 [Mayfield] not allowed to arrest us. He tried.” *Id.* She leaves and then Cuiello says to one of the
 25 other protesters, “I knew that big cop [Mayfield] was an asshole from the get go... the big guy, I
 26 knew he had a hardon to arrest us.” *Id.* The other protester responds, “There is nothing they can
 27 do.” *Id.* Cuiello responds, “They could arrest us and then we file a lawsuit. They wouldn’t win
 28 the lawsuit if they arrest us...I don’t want to be arrested that is why I asked him to tell me if you

1 are going to arrest me and I will leave. If they did arrest us, there would be a lawsuit and we
 2 would all be entitled to damages.” *Id.* Shortly thereafter, Bolbol states to another protester, “He
 3 [Mayfield] is not allowed to arrest us. He tried....the guy who he is talking to - the overweight
 4 one [Hart], really wanted to arrest us but he doesn’t get to because his watch commander has a
 5 level head...do you know how much it would have cost the County if they illegally arrested us,
 6 hundreds of thousands of dollars for one time.” Brainich Decl., Ex. D, at 3:37-4:55 MM.

7 At 6:19 pm, after speaking with Hart and the RRR employee, Mayfield approaches
 8 Plaintiffs and states, “All right, so we are going to ask and require that you stay out of the
 9 walkway.” Mayfield Decl., Ex. A-1, 11:30-12:40 MM; Brainich Decl., Ex. F, at 10:48-11:50
 10 MM. Cuiello responds, “We are not blocking anyone...you just want to make a problem. I
 11 knew from the get go when you walked up you had that energy. We are not blocking anyone.”
 12 Mayfield responds, “I have nothing but positive energy.” Cuiello states, “No you do not. I saw
 13 you from the get go. The other guy was nice [Deputy Campbell] but you had this energy.”
 14 Mayfield responds, “You don’t even know me.” Cuiello retorts, “I’ve met cops like you so
 15 many times and filed lawsuits against them, cops like you. I know you like the back of my hand.”
 16 *Id.* Mayfield then politely states, “Stay out of the walkway, please. Okay. Don’t block anybody.
 17 Don’t step in front of anyone because now you are blocking their entrance.” Cuiello interrupts
 18 and says, “We weren’t blocking anybody.” Mayfield continues, “You guys can hand out fliers all
 19 you want, you can talk all you want...don’t stand directly in front of anyone, and if you can,
 20 please stay out of the walkway. That’s all we are asking.” *Id.* He then walks away.

21 A short while later, when another protester arrived on the scene [Margo], Cuiello gives
 22 her a rundown of what had happened before her arrival. Brainich Decl., Ex. G, at 2:30-5:45 MM.
 23 He tells her, “We had a bit of a problem with the Police but everything is ironed out.” Cuiello
 24 then goes into detail as to what happened, stating, “the rodeo people came out and told us they
 25 had a Free Speech Area and we told him to call the Police. The Police came out, these four cops
 26 here, the thin one [Deputy Campbell] was really nice, but the tall one [Mayfield] – I knew he was
 27 an asshole. I could tell. I’ve dealt with so many cops like him...he had to repeat everything....
 28 Rodeo guy came out [Hart], you need to go Free Speech Area. I asked the officer, you need to

1 tell me if you're going to arrest me – not maybe arrested. I told him you better call watch
 2 commander, and he did call his watch commander...he returned and said as long don't
 3 block...They have to act like they are in charge... If they had arrested me, I would have sued
 4 them." *Id.*

5 **3. Mayfield's Third and Last Interaction With Plaintiffs**

6 At 7:36 pm, Mayfield approached Bolbol and another protester standing near the
 7 restrooms and an entrance to the rodeo, and says, "Hello, can you do me one favor." Mayfield
 8 Decl., Ex. A-2; Brainich Decl., Ex. I. Bolbol interrupts him and says, "Hold on, I need to
 9 videotape this harassment." Brainich Decl., Ex. E. Mayfield continues, "There are two pathways
 10 and you're standing in the middle; can you just scoot over a little, so not blocking the bathrooms
 11 or the pathway." Bolbol responds, "You've just got a hardon for us, don't you...you're just
 12 trying to harass us...we are not blocking anything...if you're going to be out here all weekend,
 13 this is going to be unpleasant...you thought you were going to arrest us before, you were wrong
 14 then and you're wrong now...the white guy [Deputy Campbell], he knew what he was talking
 15 about...too bad you have seniority over him, because you are very bullish." *Id.*; Brainich Decl.,
 16 Ex. I. Mayfield responds, "If anyone is being bullish, it is you." Bolbol says, "You're harassing
 17 me and blocking my sign." She then walks around Mayfield, and says, "I'm asking you to stop
 18 harassing me." *Id.* Mayfield then walks away and Bolbol says to him as he is walking away, "Go
 19 away." At no point during this exchange did Mayfield present as being aggressive, combative or
 20 threatening towards Bolbol.

21 Mayfield then walks directly over to Cuvillo, who was standing nearby, and says, "All
 22 I'm asking is that they don't block the bathroom." Mayfield Decl., Ex. A-2; Brainich Decl., Ex.
 23 H. Cuvillo responds, "They are not blocking the bathroom." They then engage in a
 24 conversation about whether a protester can block patrons or not, with Mr. Cuvillo stating that
 25 "just blocking someone is not a problem." He then asks Mayfield, "So what's your problem?"
 26 Mayfield responds, "I don't have a problem at all...I'm simply asking to keep a clear pathway so
 27 people can get in and out." *Id.* Cuvillo responds, "It is clear, people can get in and out...we've
 28 been doing this for almost 40 years. If we were going to block somebody, you would know it. I

1 guarantee it and you would arrest us. We are not here to block anyone.” Mayfield responds, “All
 2 I’m asking you a simple request that they not stand in the middle of the walkway.” Cuiello
 3 responds, “As long as you are not blocking, it’s not a problem. You’re making a problem, when
 4 there is no problem.” Mayfield responds, “I’m not making a problem. I’m getting complaints that
 5 they are standing in the middle of the walkway.” Cuiello says, “So what...they can stand
 6 wherever they want, as long as they are not blocking.” *Id.* Cuiello then tells Mayfield to read
 7 the *Kuba* case, “which is about the Grand National Rodeo.” Mayfield responds, “Okay. I’ll read
 8 it” and adds, “All we want is peace.” Cuiello responds, “We aren’t here to cause problems.”
 9 Mayfield responds, “I know you’re not. That is why we are just standing here having a
 10 conversation.” Cuiello responds, “Just having a conversation. That’s good.” Mayfield then
 11 states, “I’m getting complaints about people having to walk around.” *Id.* Cuiello says,
 12 “Wherever we are, you’ll get complaints because people don’t like our message.” He then goes
 13 on to explain to Mayfield why the First Amendment is the most important amendment. *Id.*

14 As Mayfield and Cuiello are talking, at 7:42 pm, Bolbol approaches them and says,
 15 “Let’s take a quick photo without you [Mayfield].” Mayfield Decl., Ex. A-2, 7:17 MM; Brainich
 16 Decl., Ex. J. Mayfield jokingly asks, “You don’t want me in the photo?” Bolbol responds, “If
 17 you hold our sign, you can be in the photo” and then Cuiello interjects, “No, he can be in our
 18 photo.” Mayfield walks away laughing, as plaintiffs and some of the other protesters pose for a
 19 photo. *Id.* Mayfield leaves Rowell Ranch a short while later at 7:56 pm. Mayfield Decl., Ex.
 20 A-3. There is no further interaction between Mayfield and Plaintiffs.

21 **B. Procedural Background**

22 Plaintiffs filed their Second Verified Amended Complaint on June 20, 2023 (Dkt. 54)
 23 (“SAC”). The third cause of action for violation of Civil Code section 52.1(c) and the fifth cause
 24 of action for violation of Article I, Section 2(a) of the California Constitution under Civil Code
 25 section 52.1 are alleged against both the County and Mayfield. The sixth cause of action for
 26 injunctive relief under 42 U.S.C. §1983 and declaratory relief under 28 U.S.C. §2201(a) for
 27 violation of the First Amendment is alleged against Mayfield.

28 Plaintiffs filed their motion for partial summary judgment on June 3, 2024 (Dkt 84).

III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE COUNTY DEFENDANTS SHOULD BE DENIED

A. Standard of Review

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure if the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.Proc. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);. "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Fortune Dynamic, Inc. v. Victoria's Secret Stores Band Mgmt., Inc.* 618 F.3d 1025, 1031 (9th Cir. 2010); *accord, Anderson*, 477 U.S. at 248.

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Then the nonmoving party must set forth, by affidavit or as otherwise, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250; Fed. R. Civ. Proc. 56(e). When ruling, the Court must view the facts and draw all reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

B. Plaintiffs' Improper Statement Of Undisputed Materials Facts Violates Local Rule 56-2(a), And Should Be Disregarded In Its Entirety

Rule 56-2(a) of the Local Rules of the Northern District expressly states that, "Unless required by the assigned Judge, no separate statement of undisputed facts or joint statement of undisputed facts shall be submitted." L.R. 56-2(a). This Court has no special rule requiring a separate statement, and, consequently, Plaintiffs' separate statement violates Rule 56-2(a) and should be disregarded entirely. Plaintiffs' separate statement is particularly improper, given that it appears to be an attempt by Plaintiffs to evade the twenty-five page limit on Plaintiffs' Memorandum of Points and Authorities in support of their motion ("Memorandum"), since the Memorandum does not contain *any* statement of facts, which is required by Local Rule 7-4(a)(4). In the event the Court determines a counter-statement is required from Defendants, Defendants

are prepared to draft and file such a statement.

C. The County Defendants Did Not Violate Plaintiffs’ Free Speech Rights In Violation Of The Bane Act Or Article I, Section 2 Of The California Constitution

1. First Amendment Rights And Limitations

Courts generally look at three factors when considering a First Amendment claim: (1) whether the speech was protected; (2) the nature of the forum, i.e., public or private; and (3) whether the restriction on speech was justified. *Defending Animal Rights Today and Tomorrow v. Washington Sports and Entertainment*, 821 F.Supp.2d 97, 103 (D.C. D. Ct. 2011) (“DARTT”); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

For purposes of this motion, County Defendants will assume these events involved a public forum. As to the second factor, generally animal rights protests constitute speech protected by the First Amendment. *See, e.g., Kuba v. I-A Agricultural Association*, 387 F.3d 850, 857 (9th Cir. 2004). The third factor is the primary issue in this case. “[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech.” *Heffron v. Int’l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Kuba*, 387 F.3d at 858-859 (demonstrators are not given “free rein”). Such restrictions are reasonable and permissible so long as the restrictions: (1) are justified without reference to the content of the regulated speech (*i.e.*, content neutral); (2) are narrowly tailored to serve an important government interest; and (3) leaves open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Heffron*, 452 U.S. at 856; *Kuba*, 387 F.3d at 856.

There is a “significant governmental interest in preventing traffic congestion and ensuring the safety of pedestrians and drivers alike.” *Kuba*, 387 F.3d at 858. *Id.* In addition, any restriction on speech “must not burden substantially more speech than is necessary to further the government's legitimate interests.” *Id.* at 861. As discussed below, the minimal restrictions here by the County Defendants were reasonable, served a significant government interest, and did not burden Plaintiffs’ free speech activities.

1 **2. The Evidence Does Not Show A Violation Of Plaintiffs’ Free Speech**
 2 **Rights Under The Bane Act Or Article I, Section 2 Of The California**
 3 **Constitution By The County Defendants**

4 Plaintiffs’ third cause of action alleges the County Defendants’ conduct interfered with
 5 their free speech and violated California Civil Code section 52.1 (“Bane Act”). “The essence of a
 6 Bane Act claim is that the defendant, by ... threat, intimidation, or coercion, tried to ... prevent
 7 plaintiff from doing something he or she had the right to do under the law or to force the plaintiff
 8 to do something that he or she was not required to do under the law.” *King v. State of California*,
 9 242 Cal.App.4th 265, 294 (2015). Under California law, “[a] public entity is not liable for an
 10 injury,” “[e]xcept as otherwise provided by statute.” Cal. Gov. Code §815(a); *C.A. v. William S.*
 11 *Hart Union High School Dist.* (2012) 53 Cal.4th 861, 868. A public entity may be held
 12 vicariously liable for its employee’s conduct that violates the Bane Act section under Government
 13 Code section 815.2(a), which provides that a public entity is liable for the conduct of its
 14 employees within the course and scope of their employment if the conduct would have given rise
 15 to a cause of action against the employee. *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th
 16 Cir. 2002); The terms “threat,” “intimidation,” and “coercion” are not defined in section 52.1, but
 17 courts have applied their ordinary and common meaning. *See e.g., Zamora v. Sacramento*
 18 *Rendering Co.*, 2007 WL 137239, at *8, n. 6 (E.D. Cal. Jan. 17, 2007).

19 The Bane Act states that liability may not be based on speech alone unless “the speech
 20 itself threatens violence” against a specific person. Cal. Civ. Code § 52.1(k). Several courts,
 21 however, have suggested that this is an open question, and the Directions for Use to Instruction
 22 3066 (Bane Act – Essential Factual Elements) of the Judicial Council of California Civil Jury
 23 Instructions (“CACI”) provide the option of instructing the jury that the “coercion [may be] based
 24 on a nonviolent threat with severe consequences.” (CACI 3066, Use Notes and cases cited
 25 therein.) In addition, a number of federal courts in California “have found that a threat of arrest
 26 from law enforcement can constitute ‘coercion’ under the Bane Act, even without a threat of
 27 violence.” *Cuviello v. City of Vallejo*, 2020 WL 6728796 at *8 (E.D. Cal. Nov. 16, 2020)
 28 However, in each of these cases, there were explicit threats that the plaintiffs *would* be arrested if
 they did not comply with the officer’s instructions. *See e.g., Cuviello v. City and County of San*

1 *Francisco*, 940 F.Supp.2d 1071, 1102 (N.D. Cal. 2013); *Cuviello v. City of Vallejo*, 2020 WL
 2 6728796 at *2, *8. Defendants have not located any cases where an officer stated that he
 3 “might” or “could” arrest a plaintiff but did not do so, as opposed to either explicitly stating he
 4 would arrest them or clearly using his law enforcement authority to imply that he would arrest
 5 plaintiff.

6 Civil Code section 52.1(k) provides that speech alone can constitute a violation only if the
 7 persons against whom the threat is directed “reasonably fears that, because of the speech,
 8 violence will be committed against them.” Accordingly, the courts have determined that the test
 9 for a violation of the section is “whether a reasonable person, standing in the shoes of the
 10 plaintiff, would have been intimidated by the actions of the defendants and have perceived a
 11 threat of violence.” *Richardson v. City of Antioch*, 722 F.Supp. 2d 1133, 1147 (N.D. Cal. 2010),
 12 citing *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1289-1290
 13 (9th Cir. 2001).

14 The gravamen of Plaintiffs’ claims against the County is that Mayfield threatened to arrest
 15 them for trespassing if they did not move to the FSA, and his and the other deputies’ overall
 16 conduct (allegedly standing in front of their signs and instructing them not to block patrons, etc.),
 17 was an effort to intimidate plaintiffs into giving up their First Amendment rights. However,
 18 whether an objective (reasonable person) standard or a subjective (what plaintiff actually and
 19 reasonably believed) standard is applied here, the video evidence clearly indicates that Mayfield
 20 never threatened Plaintiffs with arrest. Moreover, neither he nor any of the other the deputies
 21 blocked the protestors signs nor did they engage in any “intimidating” conduct.

22 Furthermore, Mayfield and the other deputies’ requests that Plaintiffs remain peaceful and
 23 not block patrons’ paths and/or the ingress/egress of the rodeo were at most “content neutral”
 24 requests and served a viable government interest in preventing traffic congestion and ensuring the
 25 safety of the patrons. In sum, the video evidence clearly demonstrates that Deputy Mayfield
 26 never objectively threatened Plaintiffs and that Plaintiffs never subjectively believed that they had
 27 been threatened with arrest at any time on the day in question. Neither Mayfield nor any of the
 28 other deputies violated Plaintiffs’ free speech rights.

Finally, although Plaintiffs seek summary judgment of their Fifth Cause of Action which purports to allege a violation of not only Civil Code section 52.1, but also Article I, Section 2(a) of the California Constitution, Plaintiffs' motion does not offer any argument concerning Article I, Section 2(a) with respect to Mayfield or the County, and they have waived the point. *See* Plaintiffs' Memorandum at pp.19:10-21:2. Even if Plaintiffs had not waived it, there was absolutely no interference by Mayfield or the County with Plaintiffs' free speech rights under either the United States or California Constitutions.

a. The Video Evidence Shows That Plaintiffs Had Neither an Objective Nor Subjective Belief of Arrest

Plaintiffs' primary argument is that Mayfield's overall "harassing" conduct (*i.e.*, his requests that they not block the walkways, bathrooms, patrons, etc.), along with his saying they "could be arrested for trespassing" in response to a question from Cuvillo just after Hart told them that if they didn't relocate to the FSA "bad things could happen," proves their claim that their Constitutional free speech rights were violated. However, the only evidence Plaintiffs offer of their purported fear of arrest are their declarations in which they each offer the *same exact* testimony:

During my interaction with Defendant Hart and Defendant Deputy Mayfield I felt intimidated by their threat of arrest which I believed was a tactic they were using to coerce me into giving up my free speech right to demonstrate outside the free speech area. My fear of being arrested was based on verbal threats, including, but not limited to, Defendant Hart stating, "You don't have too much of a choice," to move to the designated "Free Speech Area" and "failure to do so will not be good," and Defendant Deputy Mayfield telling me I "could be arrested" and that it was a "possibility" if I didn't move to the free speech area.

Declaration of Joseph Cuvillo, p. 6:6-12; Declaration of Deniz Bobol, p. 5:17-23. Not only do they offer the same testimony, their paraphrases of Mayfield's statements are misleading—as demonstrated by the videos themselves—Mayfield never told them they had to "move to the free speech area," nor did he say arrest was a "possibility" if they did not move there. Mayfield Decl., Ex. A-1; Brainich Decl., Ex. F.

Courts have refused to find a genuine fact "where the only evidence presented is

1 ‘uncorroborated and self-serving’ testimony.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d
 2 1054, 1061 (9th Cir. 2002). In circumstances where the Court finds nothing in the record to
 3 support a plaintiff’s allegations, other than plaintiff’s own self-serving testimony, the Court may
 4 deny plaintiff’s summary judgment motion (or, alternatively, grant Defendants’ cross-motion),
 5 “[b]ecause ‘[n]o reasonable person would undertake the suspension of disbelief necessary to give
 6 credit to the allegations made in [the] complaint.’” *Jeffreys v. City of New York*, 426 F.3d 549,
 7 555 (2d Cir. 2005). That is the case here.

8 Plaintiffs’ declarations stating that they “felt intimidated” are contradicted by the
 9 undisputed video evidence of Plaintiffs’ actions and their words. The videos show that during
 10 and shortly after Plaintiffs’ less than three minute interaction with Mayfield when he stated that
 11 they “could be arrested,” at no time did Plaintiffs have a subjective belief that they had been
 12 threatened with actual arrest. Plaintiffs never altered their actions after Mayfield’s statement;
 13 rather, they continued to protest uninterrupted, handing out pamphlets and speaking with patrons
 14 in the same location.

15 Furthermore, Plaintiffs’ specific statements at the time show that they did not have a
 16 subjective belief they had been threatened with arrest. For example, CuvIELLO said, “he
 17 [Mayfield] is calling his boss to see if he can get permission to arrest us; I don’t want to be
 18 arrested that is why I asked him to tell me if you are going to arrest me and I will leave. If they
 19 did arrest us, there would be a lawsuit and we would all be entitled to damages.” Brainich Decl.,
 20 Ex. F. Bolbol stated: “He is not allowed to arrest us. He [Hart] really wanted to arrest us but he
 21 doesn’t get to because his watch commander has a level head; do you know how much it would
 22 have cost the County if they illegally arrested us, hundreds of thousands of dollars for one time.”
 23 Brainich Decl., Ex. D. CuvIELLO also told one of the other protestors, “if they had arrested me, I
 24 would have sued them.” Brainich Decl., Ex. G at 5:45 MM. Nor does the evidence of Plaintiffs’
 25 interactions with Mayfield support an objective finding of an actual threat of arrest; rather, a
 26 “reasonable person” would interpret Mayfield’s statement as meaning that Plaintiffs were fine to
 27 continue to protest where they were, but that they “could be arrested” if they started to block the
 28 ingress/egress or became violent. Overall, the totality of the evidence clearly indicates that: (1)

1 Mayfield did not threaten plaintiffs with arrest; (2) Plaintiffs had no objectively reasonable fear of
 2 being arrested based on Mayfield's words or conduct; and (3) Plaintiffs had no actual subjective
 3 fear of being arrested at any time on May 20.

4 **b. Mayfield's Words and Conduct Satisfy the Constitutional**
 5 **Requirements for a Reasonable Time, Place and Manner**
 6 **Restriction on Speech**

7 As in *Kuba*, 387 F.3d at 857 (which involved an animal rights activist demonstrating at
 8 the Cow Palace), this case involves, at most, content neutral restrictions, and Mayfield's words
 9 and conduct were designed to advance a significant government interest in keeping the driveway
 10 and walkways free of congestion impeding the patrons and potentially emergency vehicles. For
 11 example, during his second encounter with Plaintiffs starting at about 6:19 p.m., Mayfield told
 12 them:

13 We are going to ask and require that you stay out of the
 14 walkway.... Stay out of the walkway, please. Okay. Don't block
 15 anybody. Don't step in front of anyone because now you are
 16 blocking their entrance.... You guys can hand out fliers all you
 17 want, you can talk all you want....don't stand directly in front of
 18 anyone, and if you can, please stay out of the walkway. That's all
 19 we are asking.

20 Mayfield Decl., Ex. A-1 at 11:24-11:50 MM. Mayfield used similar language with Bolbol a
 21 minute later while she was standing near the arena entrance. Mayfield Decl., Ex. A-2; Brainich
 22 Decl., Ex. E. During his last encounter with Plaintiffs starting at about 7:36 p.m., he first told
 23 Bolbol, "There are two pathways and you're standing in the middle; can you just scoot over a
 24 little, so not blocking the bathrooms or the pathway?" He then walked over to CuvIELLO, and once
 25 again stated, "All I'm asking you a simple request that they not stand in the middle of the
 26 walkway." *Id.* He further stated that, "I'm receiving complaints that they're standing in the
 27 middle of the walkway." Mayfield Decl., Ex. A-2 at 2:53 MM. And, in fact, the video evidence
 28 shows that one or more of the demonstrators would step in front of rodeo patrons as they were
 trying to approach the entrance to the rodeo, causing the patrons to have to step around the
 demonstrator. Brainich Decl., Ex. G, at 1:10, 1:46, 2:10 and 2:46 MM. The video also shows
 Plaintiff Bolbol standing in close proximity to the entrances to the bathroom facilities. *Id.*

Furthermore, the evidence shows that despite some polite urging by Mayfield ("if you

can, please stay out of the walkway”), he never in fact required Plaintiffs (or the other demonstrators) to move, and never threatened to arrest them if they did not. The overall tenor of Mayfield’s words (and his demeanor) during all of the interactions and over the course of the evening is clear—his sole interest was in keeping the demonstrators from blocking the patrons. At times, he expressed that this could be best accomplished by their moving from the driveway and pathway, which would have still allowed Plaintiffs to talk to and leaflet the patrons. Mayfield’s politely expressed wishes never turned into commands, much less threats of ejection from the grounds and/or arrest. And finally, there is no evidence that Plaintiffs in fact at any time left the driveway/pathways and moved to a location that offered them less access to the rodeo patrons.

The situation at the rodeo is similar to that in *DARTT*, 821 F.Supp.2d 97, where animal rights demonstrators who were protesting a circus, were demonstrating on a public sidewalk adjacent to the building where the circus was taking place. *DARTT*, 821 F.Supp. at 103. The police directed those demonstrators to move away from the entrance doors while the patrons were leaving en masse, and the demonstrators complied with that request, but then sued, claiming an infringement of their free speech rights. *Id.* at 105. The court found that this restriction was narrowly tailored and did not burden any more speech than necessary to protect the governmental interest. *Id.* at 107. The demonstrators were still able to reach “a sufficient number of the departing patrons.” *Id.* They were not limited “to some distant location ... trying to flag down members of the crowd after they had already dispersed; they were standing in a sea of pedestrians even at their new location.” *Id.* There was no constitutional violation even if plaintiffs were not able to reach as many patrons in their new location, because they “did not have a right to leaflet at the most advantageous spot.” *Id.* at 108. The court rejected the demonstrators’ argument that defendants could have chosen a less restrictive means, quoting the Supreme Court that, “when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.” *Id.*

Like the demonstrators in *DARTT*, 821 F.Supp.2d 97, Plaintiffs here were not being forced

1 by Mayfield and/or the other deputies into a peripheral free speech area far from the patrons
 2 attending the event; rather, at most, they were requested to step a couple of feet to the side, out of
 3 the driveway and walkways themselves, where Plaintiffs would still have the unrestricted ability
 4 to talk to the patrons and hand out their leaflets, even if Plaintiffs did not believe it was “the most
 5 advantageous spot” for them to do so. The alleged restriction (move a few feet away, off the
 6 actual pathways) is a reasonable restriction on Plaintiffs’ protected speech. Other than their self-
 7 serving declarations submitted in support of their motion, there is no evidence that they felt
 8 “chilled” in their ability to express themselves to the patrons.

9 **D. Neither The County Nor Mayfield Are Liable Under Plaintiffs’ “Working In**
 10 **Concert” Theory**

11 Apparently realizing that there is no evidence to support their contention that Mayfield
 12 (and, by extension, the County) violated their constitutionally protected free speech rights,
 13 Plaintiffs resort to a vague suggestion that the County Defendants are liable because Mayfield
 14 was “working in concert” with Defendant Kevin Hart (“Hart”), HARD’s Safety Manager.
 15 However, Plaintiffs offer no factual or legal basis for their contention. Instead, they make bare
 16 conclusory allegations in Paragraph 72 of the SAC, that Defendants “engaged in a concert of
 17 action,” to further a “common scheme,” and had “knowledge of the conspiracy.” SAC, p. 15, ¶7,
 18 and similar conclusory statements in their declarations. Having failed to offer any evidence, legal
 19 authority, or argument on the point, Plaintiffs have waived it. In his declaration, CuvIELLO merely
 20 repeats the conclusory statement that Mayfield was “working in concert” with Defendant Hart.

21 Conclusory statements of “conspiracy,” are insufficient to plead a claim, let alone
 22 establish one. *See Slotnick v. Garfinkle*, 632 F.2d 163, 165-166 (1st Cir. 1980) (complaint was
 23 properly dismissed where it relied on conclusory allegations of conspiracy under section 1985).
 24 “To state a claim for conspiracy to violate constitutional rights, ‘the plaintiff must state specific
 25 facts to support the existence of the claimed conspiracy.’” *Olsen v. Idaho State Bd. Of Medicine*,
 26 363 F.3d 916, 929 (9th Cir. 2004) (quoting *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir.
 27 1989)). A plaintiff “must also allege that one or more of the conspirators ‘did, or caused to be
 28 done, any act in furtherance of the object of the conspiracy,’ whereby another was ‘injured in his

person or property,' or 'deprived of having and exercising any right or privilege of a citizen of the United States.'" *Id.* A plaintiff must establish facts concerning a specific agreement between the parties, the scope of the conspiracy, the role each played, and when and how the conspiracy operated. *Steshenko v. Gayrard*, 44 F.Supp.3d 941, 957 (N.D. Cal. 2014). Plaintiffs failed to introduce any evidence showing that Mayfield was engaged in a scheme with Hart (or anyone else) to violate Plaintiffs' right to free speech.

The fact that Mayfield was standing by observing the conversation between Defendant Hart and Plaintiff CuvIELLO is in no way indicative of action "in concert" by Mayfield. Observing a conversation between two adversarial parties, Plaintiff CuvIELLO and Defendant Hart, was entirely consistent with the reason why Mayfield and his fellow deputies had been assigned to the rodeo event in the first place—to provide a general law enforcement presence, or, in other words, to keep the peace.

In sum, Plaintiffs' motion for summary judgment should be denied in its entirety.

IV. THE COUNTY AND MAYFIELD ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CROSS-MOTION, OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT

A. Neither Mayfield Nor The County Violated Plaintiffs' Constitutionally-Protected Free Speech Rights

Based on the same evidence and legal authorities discussed above, the County Defendants are entitled to summary judgment on all of Plaintiffs' claims for alleged violation of Plaintiffs' free speech rights under either the United States or California Constitutions.

Mayfield is also entitled to summary judgment on Plaintiffs' Sixth Cause of Action, which seeks injunctive relief pursuant to 42 U.S.C. § 1983 against Mayfield for his purported violation of Plaintiffs' First Amendment rights, and a declaration under 42 U.S.C. § 2201(a) that he violated these rights. Consequently, the County Defendants are entitled to summary judgment in their favor on the Third, Fifth and Sixth Causes of Action of Plaintiffs' Second Amended Complaint. Should the Court deny Defendants' summary judgment, the Court may enter partial summary judgment on the issues discussed below.

B. Plaintiffs' Recovery Is Limited To Statutory Damages Of \$4,000 If A Violation Of The Bane Act Is Found

Plaintiffs' only state law claims against Mayfield and the County are brought under the Bane Act (Civ. Code section 52.1). Civil Code section 52.1(c) provides that, "[a]n individual . . . may institute and prosecute in their own name and on their own behalf a civil action for damages, including, but not limited to damages under Section 52, injunctive relief, and other appropriate equitable relief" However, neither subsection (a) or (b) refers to Civil Code section 52.1. Section 52(a) provides for actual damages for violations of Civil Code sections 51, 51.5 and 51.6. Section 52(b) provides for actual damages, punitive damages (to be determined by a jury or the court sitting without a jury), a civil penalty of \$25,000, and attorney's fees, for violations of Civil Code sections 51.7 or 51.9.

Plaintiffs both admit that the only "compensatory" damages they are seeking against the County and Mayfield are \$29,000 for each Plaintiff; broken down as follows: \$25,000 under California Civil Code § 21 and \$4,000 under California Civil Code § 52(a). Plaintiffs also admit that they are not seeking any special damages pursuant to 42 U.S.C. § 1983. During their depositions, Cuvillo and Bolbol both admitted that they suffered no physical, emotional or psychological injuries as a result of their interactions with the ACSO deputies, nor are they seeking any compensation for any lost wages and/or lost earning capacity. Brainich Decl., Ex. A, Cuvillo Depo., p. 113:8-16; Ex. B, Bobol Depo., p. 120:2-15.

Where "no actual damages are sought, the \$4,000 statutory minimum damages may be awarded without proof of harm and causation," citing *Koire v. Metro Car Wash*, 40 Cal.3d 24, 33 (1985)²; see also *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir. 2007); *Kwon v. Ramirez*, 576 F.Supp.3d 696, 699 (C.D. Cal 2021). Since plaintiffs admit that they are not seeking compensatory damages, each would be able to recover, at most, \$4,000 in statutory damages.

² *Koire* did not involve a claim under the Bane Act, but rather, a claim under the Unruh Civil Rights Act (Civ. Code §51) brought by a male plaintiff who argued that giving women free admission to a night club on "Ladies Night" violated the Unruh Act. When defendants argued that the plaintiff could show no harm, the court noted that "Section 52 provides for minimum statutory damages of \$250 for every violation of section 51, regardless of the plaintiff's actual damages." (Since *Koire* was decided, the minimum statutory damages amount under section 52(a) has increased to \$4,000.)

C. Plaintiffs Cannot Recover A \$25,000 Civil Penalty

Under the language of Civil Code sections 52.1 and 52, as well as case law, an individual bringing an action pursuant to section 52.1(c) is not entitled to a civil penalty of \$25,000. Section 52.1(b) provides that in cases brought by the Attorney General, any district attorney, or a city attorney, the public attorneys may seek a civil penalty of \$25,000. However, section 52.1(c), which allows an individual to bring his or her own action, does not include a provision that the individual may seek a civil penalty. Rather, the provision only states that an individual may bring a “civil action for damages, including, but not limited to damages under Section 52, injunctive relief, and other appropriate equitable relief.” Civ. Code §52.1(c) (emphasis added). Civil Code section 52(a) does not include a civil penalty. Section 52(b) provides for recovery of actual damages, exemplary damages, a civil penalty of \$25,000, and attorney’s fees. However, in *Cuviello, et al. v. City of Oakland, et al.*, 2010 WL 3063199 at *5 (N.D. Cal. Aug. 3, 2010), the court determined that while an individual bringing an action under Civil Code section 52.1 could recover damages, “damages” did not include recovery of a civil penalty. The court stated that “Section 52(b)(2) civil penalties are not available under Section 52.1(b).” *Id.* at *6. The court observed that section 52.1, as a whole, provides five potential remedies: damages, injunctive relief, equitable relief, civil penalties, and attorney’s fees. *Id.* at *5. “[T]he word ‘damages’ in Section 52.1(b) does not include, sub silentio, the civil penalties specified in Section 52(b)(2). Section 52 damages include actual damages, treble damages, and exemplary damages.” *Id.* at *6. The court noted that there is a distinction between civil penalties and damages. “‘Penalty’ is defined as ‘a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party’s loss),’ whereas ‘damage’ is defined as ‘[o]f or relating to monetary compensation for loss or injury to a person or property.’ Black’s Law Dictionary (9th ed. 2009) 1247, 445.” *Id.* at *6.

Judge Patel reached the same conclusion in *Bolbol v. City of Daly City*, 754 F.Supp.2d 1095, 1117 (N.D. Cal. 2010); *see also Weaver v. City of Santa Clara*, 2014 WL 6330402 (N.D. Cal. Nov. 14, 2014) (“it is settled in the Northern District that the reference to ‘damages’ (and not ‘civil penalty’) in § 52.1(b) . . . eliminates the possibility of a \$25,000 penalty under §52(b)(2).”)

1 In addition, at least one California court has concluded that the \$25,000 civil penalty under Civil
 2 Code §52(b) is not available to a plaintiff who brought a claim under 52.1(c). *Center for Bio-*
 3 *Ethical Reform, Inc. v. Irvine Co., LLC*, 37 Cal.App.5th 97, 115-116 (2019). The court stated that
 4 the \$25,000 civil penalty “is only available when a person is denied a ‘right provided by [Civil
 5 Code] [s]ection 51.7 or 51.9.’ (Civ. Code, §52, subd. (b).)” *Id.* Neither provision was alleged
 6 against the County Defendants here.

7 In sum, as a matter of law, Plaintiffs are not entitled to recover \$25,000 in civil penalties.

8 **D. Plaintiffs Cannot Recover Treble Damages From County Defendants**

9 Since Plaintiffs are not claiming any compensatory damages (e.g., past or future economic
 10 or noneconomic loss), there is no amount of actual damages to treble. As the language of section
 11 52(a) and the Judicial Council’s directions in VF-3035 suggest, only actual damages proven
 12 would be the subject of trebling. Nothing suggests that in the absence of actual compensatory
 13 damages, that the \$4,000 statutory amount may be trebled.

14 Furthermore, some courts have concluded that “the up-to-treble add-on under Section 52
 15 bears the hallmarks of punitive damages—including being awarded at the discretion of the
 16 factfinder in an unfixed amount—and they are thus unavailable against a governmental entity.”
 17 *See Loggervale v. Holland*, 2023 WL 3958893 at *36 (N.D. Cal. June 12, 2023) (appeal to Ninth
 18 Circuit filed on July 11, 2023). In *Archibald v. County of San Bernardino*, 2018 WL 8949779, at
 19 * 1 (C.D. Cal. May 10, 2018), the court found “that treble damages under §52(a) are properly
 20 considered punitive or exemplary, and [Cal. Government Code] § 818 immunizes the County
 21 from that liability.” In reaching that conclusion, the court relied on other federal court decisions,
 22 as well as language regarding Civil Code section 52 in *Harris v. Capital Growth Inv’rs XIV*, 52
 23 Cal.3d 1142 (1991), *overruled on other grounds in Munson v. Del Taco, Inc.*, 46 Cal.4th 661
 24 (2009). In *Harris*, the California Supreme Court stated: “the damages provision allowing for an
 25 exemplary award of up to treble the actual damages suffered with a stated minimum amount
 26 reveals a desire to punish intentional and morally offensive conduct.” *Harris*, 52 Cal.3d at 1172.
 27 As the court in *Archibald* explained: “indeed treble damages under §52(a) bear some of the
 28 hallmarks of punitive damages: they are awarded at the discretion of a factfinder, and the amount

1 is not fixed.” *Archibald v. County of San Bernardino*, 2018 WL 8949779, at *1; *see also H.M. v.*
 2 *County of Kern* 2022 WL 286614, at *6 (E.D. Cal. Jan. 31, 2022) (“Because California
 3 Government Code §818 does not permit the recovery of punitive damages against a public entity
 4 such as the County, Plaintiff is unable to recover treble damages under Section 52(a).”); *Jefferson*
 5 *v. City of Fremont*, 2012 WL 1534913, at *7 (N.D. Cal. April 30, 2012) (court rejected plaintiff’s
 6 request for up to three times the amount of actual damages against the City, because it is punitive
 7 in nature and precluded by Government Code section 818).)

8 Furthermore, the California Supreme Court recently held that Government Code section
 9 818 applies to bar damages that would function as an award of punitive damages. *Los Angeles*
 10 *Unified School District v. Superior Court*, 14 Cal.5th 758 (2023). In reaching that conclusion, the
 11 Court rejected an interpretation that only damages that are “simply and solely punitive” are
 12 precluded by section 818. “[T]he test under section 818 is whether damages would be awarded
 13 under Civil Code section 3294, or would otherwise be ‘imposed primarily for the sake of example
 14 and by way of punishing the defendant’ (Gov. Code, §818) such that they would function, in
 15 essence, as punitive or exemplary damages.” *Id.* at 775-776. During its lengthy discussion of
 16 section 818, the court noted that, “[t]he disinclination to subject public entities to punitive and
 17 exemplary damages has extended to treble damages in circumstances where these damages are
 18 imbued with a sufficiently exemplary character.” *Id.* at 769. In sum, Plaintiffs cannot recover
 19 treble damages from the County Defendants.

20 **E. Neither The County Nor Mayfield Are Liable For Punitive Damages**

21 It is well settled that Plaintiffs, as a matter of law, cannot maintain their punitive damage
 22 claim against the County based on either their state or federal law claims. Gov. Code § 818 [“a
 23 public entity is not liable for [punitive or exemplary] damages ... or other damages imposed
 24 primarily for the sake of example and by way of punishing the defendant”; *Marron v. Superior*
 25 *Court*, 198 Cal.App.4th 1049, 1059 (2003) [same, citing § 818]; *City of Newport v. Fact*
 26 *Concerts, Inc.*, 453 U.S. 247, 271 (1981) [public entities immune from punitive damages under
 27 42 U.S.C. § 1983].) Although an award of punitive damages directly against Mayfield would be
 28 permissible under appropriate circumstances (*Smith v. Wade*, 461 U.S. 30, 36 (1983)), the facts

1 here establish, as a matter of law, that Plaintiffs are not entitled to such a recovery against
2 Mayfield.

3 For the state law claims against Mayfield, the punitive damages claim is subject to
4 California law standards for recovery. *Coughlin v. Tailhook Ass’n*, 112 F.3d 1052, 1056 (9th Cir.
5 1997). Under California law, a plaintiff must prove by clear and convincing evidence that a
6 defendant has been guilty of oppression, fraud, or malice. Cal. Civ. Code §3294(a). “Malice”
7 means conduct which is intended by the defendant to cause injury to the plaintiff, or despicable
8 conduct which is carried out by the defendant with a willful and conscious disregard of the rights
9 or safety of others. Civ. Code §3294(c)(1). “Oppression” means conduct that subjects a person
10 to cruel and unjust hardship in conscious disregard of that person’s rights. Civ. Code
11 §3294(c)(2). “Fraud” means an intentional misrepresentation or concealment of a material fact
12 known to the defendant with the intent of depriving the plaintiff of property, legal rights, or
13 otherwise causing injury. Civ. Code §3294(c)(3). Malice may be shown where the defendant
14 exhibits “the motive and willingness to vex, harass, annoy, or injure,” *Nolin v. Nat’l Convenience*
15 *Stores, Inc.*, 95 Cal. App. 3d 279, 285 (1979), or a “conscious disregard of the rights and safety of
16 others” *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1000 (1993).

17 Punitive damages may also be available under section 1983. Because it is a claim under
18 federal law, federal standards apply. A plaintiff has the burden of proof that punitive damages
19 should be awarded and the amount, by a preponderance of the evidence.” *Dang v. Cross*, 422
20 F.3d 800, 805 (9th Cir. 2005). “[A] ‘jury may award punitive damages under section 1983 either
21 when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or
22 callous indifference to the constitutional rights of others.’” *Id.* at 807 (quoting *Morgan v.*
23 *Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993). “The standard for punitive damages under §1983
24 mirrors the standard for punitive damages under common law tort cases,” and “malicious,
25 wanton, or oppressive acts or omissions are within the boundaries of traditional tort standards for
26 assessing punitive damages.” *Id.* (citing *Smith v. Wade*, 461 U.S. 30, 34 (1983).

27 Even if Mayfield were somehow found liable for violating plaintiffs’ free speech rights, it
28 would not have been clear to a reasonable officer that informing plaintiffs that they “could be

1 arrested” and/or asking plaintiffs not to block the walkways or access to the bathroom facilities
 2 was unlawful. There is absolutely no evidence of malice, oppression or fraud, evil intent or
 3 motive, disregard of plaintiffs’ safety, and/or reckless indifference to Plaintiffs’ rights on the part
 4 of Mayfield; there was no physical harm to plaintiffs; and there was no misuse or abuse of power
 5 or authority. In *Cuviello, et al. v. City of Oakland, et al.*, Northern District of California Case No.
 6 C-06-5517 MHP (Dkt. No. 218) (July 20, 2009), the magistrate judge rejected Cuviello’s claim
 7 for punitive damages against the individual police officers, finding that, “Plaintiff’s free speech
 8 rights were not clearly established as it would not have been clear to a reasonable officer that his
 9 conduct was unlawful in the situation he or she confronted.” *Id.* at p. 40:19-21. There are no
 10 facts to support an award of punitive damages against Mayfield.

11 **F. Plaintiff Cuviello Cannot Recover His Attorney’s Fees From Defendants**

12 Generally, when a plaintiff represented by counsel prevail at trial, the court may award
 13 him or her reasonable attorney’s fees based on both the plaintiff’s federal and state court claims.
 14 *See* 42 U.S.C. § 1988; Cal. Civ. Code § 52.1(i). However, here, as a matter of law, Cuviello is
 15 not entitled to any recovery of attorneys’ fees since he is not represented by legal counsel, and
 16 instead is appearing *pro se*. “Attorneys’ fees are not available to plaintiff because he is
 17 proceeding without representation by a lawyer.” *Robinson v. Kiran Ahuja*, 2021 WL 5564804 at
 18 * 4 (N.D. Cal. Nov. 29, 2021) (civil rights case involving employment discrimination under Title
 19 VII of the 1964 Civil Rights Act), citing *Kay v. Ehler*, 499 U.S. 432, 435 (1991).

20 Consequently, the County Defendants are entitled to summary judgment on any claim by
 21 Mr. Cuviello for attorney’s fees.

22 **G. Plaintiffs Are Not Entitled To An Injunction Under 42 U.S.C. §1983 Or**
 23 **Declaration Under 28 U.S.C. §2201(a) Against Mayfield**

24 Mayfield is entitled to summary judgment as to Plaintiffs’ Sixth Claim for Relief, because
 25 there is no evidence that he violated Plaintiffs’ free speech rights.³

26 ³ Plaintiffs have alleged no cause of action for violation of section 1983 against the County. *See*
 27 SAC at pp. 23:21-25:3. There is no vicarious liability under § 1983, and public entities are only
 28 liable for a constitutional violation based on its policy, custom, or practice. *Dougherty v. City of*
Covina, 654 F.3d 892, 900 (9th Cir. 2011), citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658,
 694 (1978).

1 To prevail on a claim under 42 U.S.C. section 1983, a plaintiff must establish two
 2 essential elements: (1) that a right secured by the Constitution of laws of the United States was
 3 violated; and (2) that the violation was committed by a person acting under the color of state law.
 4 *West v. Atkins*, 487 U.S. 42, 48 (1988). "To state a viable Section 1983 claim against an
 5 individual, a plaintiff's complaint must allege that the individual's own action caused the
 6 particular constitutional deprivation alleged." *Manning v. County of Los Angeles Board of*
 7 *Supervisors*, 2019 WL 3064469 at *3 (C.D. Cal. April 23, 2019).

8 As discussed above, the evidence shows that Mayfield was doing nothing more than
 9 simply requesting that Plaintiffs stay out of the patrons' way and not block ingress/egress to the
 10 rodeo entrance and the bathrooms. Plaintiffs never changed their location or their conduct in any
 11 way. Their own statements caught on video establish that at no point did Plaintiffs believe they
 12 were about to be arrested or even ordered to the FSA by Mayfield. In sum, there is no evidence
 13 that Plaintiffs ever felt "chilled" in their ability to express themselves to the patrons.

14 Finally, even if the evidence had shown some infringement on Plaintiffs' free speech
 15 rights by Mayfield, Plaintiffs have not established any need for an order enjoining Mayfield from
 16 interfering with Plaintiffs' rights in the future. Plaintiffs have not offered any evidence of any
 17 free speech issues arising at the rodeo that was subsequently held in 2023 at Rowell Ranch or that
 18 Mayfield was even present at the rodeo since 2022. To the contrary, Plaintiffs admit they had no
 19 problems demonstrating at the rodeo at Rowell Ranch in 2023. Brainich Decl., Ex. A, CuvIELLO
 20 Depo., p. 111:8-112:13; Ex. B, Bolbol Depo., p. 119:11-24. There is no evidence that Plaintiffs
 21 would suffer future harm absent injunctive relief.

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1 **V. CONCLUSION**

2 For the reasons set forth above, this Court should grant summary judgment to the County
3 Defendants and deny Plaintiffs' motion for partial summary judgment as to the County
4 Defendants.

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6 Dated: June 27, 2024

FENNEMORE WENDEL

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8 By: /s/ Thiele R. Dunaway

9 Thiele R. Dunaway
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11 County of Alameda and Alameda County
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